Supreme Court, U.S.
FILED
JAN 22 2010
OFFICE OF THE CLERK

No. 09-426

In the
Supreme Court of the United States

DONALD S. EKLUND,

Petitioner,

v.

WHEATLAND COUNTY, AND ITS SHERIFF,
JAMES ROSENBERG,

Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of the State of Montana

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas E. Towe
Counsel of Record
For Petitioner
2525 6th Avenue North
PO Box 30457
Billings, MT 59107
(406) 248-7337

QUESTIONS PRESENTED

Whether the Plaintiff was denied due process of law when he was forced to accept a jury in his personal injury law suit all of whom were taxpayers of the Defendant county and who feared they personally would be required to participate in the payment of a very large verdict against the county. Due process is denied if either the Judge or the Jury have a significant financial interest in the outcome. *Aetna Life Insurance Company v. LaVoie*, 475 US 813, 824 (1986). Here the average juror's share was $1,241.63 and the jury foreman's share was $7,334.42 out of his own pocket.

PARTIES

The Petition is Donald S. Eklund.

The Respondents are Wheatland County and its Sheriff, James Rosenberg.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

REPLY BRIEF OF PETITIONER 1

POINTS AND AUTHORITIES 1

I. Wheatland County has Not Answered the Serious Constitutional Violations Raised in the Petition 2

A. That Montana has a Good Constitution is Irrelevant. 2

B. That the Damages are Speculative is Irrelevant. 3

C. The Strength or Weakness of Eklund's Case on the Facts is Irrelevant. 4

D. The Complexity of the Property Tax System is Irrelevant. 5

E. Giving Deference to the Trial Judge

TABLE OF CONTENTS CONTINUED

who Merely Followed the Legislative Mandate in Voir Dire is Irrelevant and Meaningless. 6

F. The Citation of Other Cases in Which the Jury has Returned a Small Verdict for the Plaintiff is Irrelevant. 7, 8

G. That the Montana Supreme Court Carefully Reviewed the Merits is Irrelevant 9

II. The Possible Temptation Test is just as Sound When Applied to a Jury as to a Judge 10

III. It is not Difficult to Fashion a Workable Test for Possible Temptation. A Precise Test is Unnecessary 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Aetna Life Insurance Co. v. LaVoie,
475 US 813, 822 (1986) 2, 10

Chambers v. City of Helena,
2002 MT 142, 310 Mont. 241, 49 P.3d 587 (2002)
Id. at ¶47, 310 Mont. 257, 49 P.3d at 596 8

Curtis v. Loether,
415 US 189, 192 n.6 (Justice Marshall, J., writing for
the Court 10

Eklund v. Wheatland County,
Cotter, J., dissenting App. 16-22 7

Haman v. MACO Insurance Co.,
2004 MT 44, 320 Mont. 108, 86 P.3d 34 (2004)
Id. at ¶5, 320 Mont. at 109, 86 P.3d at 34 8

In re: Murchison,
349 US 133, 136 (1955) 2, 10, 11

Irvin v. Dowd,
366 US 717, 721-722 (1961) 2, 11

Massee v. Thompson,
2004 MT 121, 321 Mont. 210, 90 P.3d 394 (2004)
Id. at ¶1, 321 Mont. at 213, 90 P.3d at 396 ..... 8, 9

TABLE OF AUTHORITIES CONTINUED

OTHER AUTHORITIES CONTINUED

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 9, 13

REPLY BRIEF OF PETITIONER

Petitioner,(hereinafter "Eklund"), respectfully submits the Respondent's Brief (hereinafter "Opposition Brief") presents a number of new arguments none of which are relevant to the serious questions posed to this Court in the Petition.

POINTS AND AUTHORITIES

I.

Wheatland County has Not Answered the Serious Constitutional Violations Raised in the Petition.

In his Petition for Writ of Certiorari, Eklund pointed out that the jurors who sat on his civil case had a personal pecuniary interest in the outcome of the lawsuit. As taxpayers of a county with only 2010 people, Eklund's claim of $1,375,000 would have an enormous impact on each juror if the County had to pay the whole amount out of their general fund.

Eklund pointed out that each juror would have to pay between $63.83 and $7,334.42 if Plaintiff were successful. This is an average of $1,241.63 for each juror who sat on this jury. The jury foreman was the largest taxpayer with a potential liability of $7,334.42. Petitioner suggested that such large

numbers constitute a "possible temptation" to the average juror that prevents the juror from holding a balance nice, clear and true that a is required of an impartial jury. Eklund contends that a juror cannot be permitted to sit on a case where he or she has such a large interest in the outcome. *In re: Murchison*, 349 US 133, 136 (1955); *Aetna Life Insurance Co. v. LaVoie*, 475 US 813, 822 (1986); *Ward v. Village of Monroeville*, 409 US 57, 60 (1972).

Petitioner urged that the law is well-settled as it relates to Judges and that there is no reason why it should not also apply equally to jurors. *In re: Murchison*, 349 US 133, 136 (1955); *Turner v. Louisiana*, 179 US 466, 472 (1965); *Irvin v. Dowd*, 366 US 717, 721-722 (1961); *Thiel v. Southern Pac. Co.*, 328 US 217, 219 (1946). (See Eklund's Petition for Writ of Certiorari at 13-22.)

Respondents, (hereinafter "Wheatland County") fail to even address these serious constitutional questions. With one exception (see Argument II herein) they do not even truly disagree with Eklund's arguments. With this exception, Wheatland County avoids the real issues of this case by superficial arguments that do not reach the central point of Eklund's Petition.

A. That Montana has a Good Constitution is Irrelevant.

For example, in Argument I, Wheatland

County argues the Montana Constitution protects individual rights more broadly than the Federal Constitution and that the Montana Supreme Court has breathed life into these rights. What the Montana Constitution and the Montana Supreme Court has done with regard to other rights, such as the right to know, the right to privacy, and the right to individual dignity, is irrelevant to the due process question that Petitioner has raised of whether Petitioner has a right to an unbiased jury to decide the facts.

B. That the Damages are Speculative is Irrelevant.

Further, in Argument II, Wheatland County argues that the claim for $1,325,000.00 [sic. it is $1,375,000] in damages is speculative. Wheatland County then attempts to review the facts to show why it thinks this amount is speculative. What Wheatland County doesn't say is that Wheatland County made virtually no defense to the amount of damages claimed by Eklund. Their cross-examination of the many medical doctors and other persons who testified as to these damages was minimal if not non-existent. The point Eklund wishes to make is that the case for damages was so strong that it would be hard to argue realistically for a lesser amount once liability was established.

More importantly, however, a review of the facts of the case and the issue of whether Eklund's

claim was speculative or not is irrelevant to constitutional issue of whether the jurors were biased.

C. The Strength or Weakness of Eklund's Case on the Facts is Irrelevant.

Wheatland County tries to minimize the overwhelming evidence of liability. What one witness said does not overcome the virtual admission of liability on the part of the sheriff officers for Wheatland County who admitted driving 75 mph in the middle of a small town, which they themselves acknowledged was "way to fast." (See the facts regarding the Sheriff's hot pursuit in Eklund's Petition at 6-9.)

Stating that the jurors are entitled to disregard experts does not diminish the overwhelming evidence of Eklund's expert witness on hot pursuits, Richard Dague, who called on his many years of experience as a police officer, an Assistant Police Chief, a trainer, and chief instructor. He testified that the actions of Wheatland County personnel essentially constituted a comedy of errors in that the sheriff officers failed to follow their own training, failed to follow their own written policies, and failed to avoid risks to other persons and property when they had an ample opportunity to do so. (See Eklund's argument regarding the over-

whelming evidence of negligence in his Petition at 9-10.)

Hot pursuits are truly a serious concern for law enforcement abuse - between 25% and 50% of all law enforcement officers are killed in the line of duty involving vehicles, often during hot pursuits.

Nevertheless, whether the facts supporting liability were strong or weak is totally irrelevant to the issue of whether the jurors were biased. The well settled law is that the decider of the facts cannot be subject to a possible temptation as these jurors were subjected.

D. The Complexity of the Property Tax System is Irrelevant.

Wheatland County argues that the reappraisal system for property taxes in Montana is fair and is too complicated for the average person to really understand. (Brief in Opposition at 14.)

Regardless of how complex the computations and figures may be, it can be assumed the average taxpayer who actually writes out a check for their property taxes every year understands, in general, the impact on their own taxes of increased spending by its local government. Even if some jurors may have been confused, it must be assumed that in the

privacy of the jury deliberations, someone would explain the full impact of a $1,375,000.00 charge against Wheatland County.

To argue, as Wheatland County does, that taxpayers can be trusted to be impartial even when they personally face a possible personal increase in their own taxes of $7,335.42 or $4,769.15 (an average of $1,241.63 for each of the twelve jurors) is not realistic. (Opposition Brief at 14-15.) That is precisely the "possible temptation" that this Court has referred that would prevent a person judging the facts from holding the balance nice, clear and true.

Even every juror could set aside such an overwhelming temptation (we suggest they clearly could not), there is still an appearance of bias that can never be overcome. The citizens of this country will simply not accept the notion that a person who must himself or herself pay over a $1,000.00 to fund a verdict is not biased. To argue to the contrary is simply not realistic.

E. Giving Deference to the Trial Judge who Merely Followed the Legislative Mandate in Voir Dire is Irrelevant and Meaningless.

Further, Wheatland Count argues that the provisions for challenging jurors exists and we should not second guess the Trial Judge who followed those

provisions nor the Legislature which specifically mandated that a taxpaying juror cannot be dismissed for cause. (Opposition Brief at 15-16.) Wheatland County argues that deference must be given to the

Trial Judge and since *voir dire* was extensive in this case, this Court must assume Eklund was treated fairly.

Again, this does not address the serious constitutional question of whether a juror with not only a possible temptation, but an almost certain temptation can properly decide the facts of a civil case. In fact, not everyone agreed that the *voir dire* procedure was proper and constitutional. (See *Eklund v. Wheatland County*, Cotter, J., dissenting, App. 16-22.)

Even the most thorough *voir dire* cannot cure the bias in this case. The Montana legislature has mandated that being a taxpayer of the Defendant is not grounds for a challenge for cause. §25-7-223(5), MCA. Thus, when the Trial Judge insists on following that legislative mandate regardless of the consequences error is committed. Giving deference to the Trial Judge (Opposition Brief at 16-17) does not cure the constitutional error.

F. The Citation of Other Cases in Which the Jury has Returned a Small

Verdict for the Plaintiff is Irrelevant.

The citation of cases in which jurors have awarded damages against their own local government does not solve the problem. (See Opposition Brief at 18-19.) That too is irrelevant. Whether or not bias existed in other cases does not answer the question of bias in this case.

The three cases cited by Wheatland County (Opposition Brief at 18-19) do not support Wheatland County's argument. For example, *Haman v. MACO Insurance Co.*, 2004 MT 44, 320 Mont. 108, 86 P.3d 34 (2004), does not involve a municipal Defendant. Further, the jury verdict was reduced to $43,000.00, a far cry from the $1,375,000 involved here. (*Id.* at ¶5, 320 Mont. at 109, 86 P.3d at 34.) More importantly, Cascade County which has a population of 82,026.00 is hardly comparable to Wheatland County's 2,010.[1]

In *Chambers v. City of Helena*, 2002 MT 142, 310 Mont. 241, 49 P.3d 587 (2002), the jury brought back a verdict in favor of the municipality and awarded no damages. (*Id.* at ¶47, 310 Mont. 257, 49 P.3d at 596.)

Finally, in *Massee v. Thompson*, 2004 MT 121, 321 Mont. 210, 90 P.3d 394 (2004), the jury verdict

---

[1] Numbers from U S. Census Bureau, State and County Quick Facts (estimates based on 2008 data.

was $358,000.00 in a municipality (Broadwater County) over twice the size of Wheatland County at 4,704.[2] (*Id.* at ¶1, 321 Mont. at 213 90 P.3d at 396.)

G. That the Montana Supreme Court Carefully Reviewed the Merits is Irrelevant.

Finally, Wheatland County contends that the Montana Supreme Court carefully reviewed the merits of Petitioner's claim and correctly decided the case on the merits. (Opposition Brief at 23.)

Whether or not the Montana Supreme Court found the case correctly decided on the merits is irrelevant. The question is whether or not Eklund had a fair trial in the first instance by jurors who were impartial. On this point, it is clear he did not. By denying him a fair and impartial jury, a violation of the 14th Amendment took place and he is entitled to relief from this Court. *Tumey v. Ohio,* 273 US 510. 523 (1927).

While this Court has not extended the right to jury trial in civil cases as an element of due process applicable to state courts through the 14th Amendment (*Minneapolis and St. Louis Railroad Company v. Bombolis*, 241 US 211, 217 (1916), it is

---

[2]U.S. Census Bureau, State and County Quick Facts (estimates based on 2008 data.

an open question. See, *Curtis v. Loether*, 415 US 189, 192 n.6 (Justice Marshall, J., writing for the Court). However, this is not the issue in the instant case. The issue in the instant case is whether an American citizen is entitled to a court to try his case by persons who do not have an interest in the outcome. *In re: Murchison*, 349 US 133, 136 (1955); *Aetna Life Insurance Co. v. LaVoie*, 475 US 813, 822 (1986); *Tumey v. Ohio*, 273 US 510, 523 (1927); *Ward v. Village of Monroeville*, 409 US 58, 60 (1972).

II.

The Possible Temptation Test is just as Sound When Applied to a Jury as to a Judge.

Wheatland County claims common sense dictates rules which govern the action of a Judge are not properly applicable to a jury of twelve citizens, and that the "possible temptation" test is not constitutionally sound as applied to a jury. (Brief in Opposition at 21.)

The cases cited by Eklund, however, deal with judges and mayors charged with deciding the facts (Petition at 16-20) just as jurors are charged with deciding the facts. There can not be any real difference between a judge or mayor charged with deciding the facts and a juror of 12 citizens deciding the facts; they are both subject to the same possible

temptation when they each have a pecuniary interest in the outcome. As this Court stated in *In re: Murchison,* 349 US 133, 136 (1955), "a fair trial in a fair tribunal is a basic requirement of due process." A jury is as much a part of this fair tribunal as is the judge. *Id.*

Further, the fact that there is more than one person involved in a jury does not solve the problem. The bias of any one juror taints the whole jury; under our system of jurisprudence not one single jury can be biased or the Plaintiff is denied due process of law. See *Reynolds v. United States,* 98 US 145, 154-56 (1878); *Irvin v. Dowd*, 366 US 717, 721-722 (1961).

III.

It is not Difficult to Fashion a Workable Test for Possible Temptation. A Precise Test is Unnecessary.

Wheatland County contends that this Court has never ruled that every taxpayer has an imputed bias and can never serve on a jury in which his municipality is a Defendant. (Opposition Brief at 20.) Eklund does not contend that this Court should go that far. Although such a position would be reasonable, it is not necessary for the decision in this case to make universal rule that no taxpayer can ever serve on a jury involving his or her municipality.

In many instances, the impact on an ordinary taxpayer is so small that there maybe an issue of de minimis. It is simply not necessary in this case to decide that issue. Here we have a request for $1,375,000.00 to be spread among a population base of only 2,010 people in which every single juror would be assessed some money (from $63.83 to $7,334.42 with an average of $1,241.63) if the Plaintiff's claim is sustained. The sum of $7,334.42 is not de minimis. It is not minimal. Mr. Lammars cannot serve on this jury. Whether the same applies to a lesser amount is not necessary to decide in this case.

Wheatland County also claims it would be difficult to administer a "possible temptation" test to determine when a juror can serve and when a juror cannot serve. Wheatland County contends that the public policy and practical implications of imputing bias to taxpayers cannot be expressed in a precise formula. (Opposition Brief at 21.)

Eklund insists that no such precise test is necessary. This Court can overlook a temptation which is truly de minimis or minimal if it chooses. That issue, however, is not presented in the instant case. The solid hard damage request by Eklund in the instant case is $1,375,000.00 to be distributed among 2,010 people. The foreman of the jury, if the total amount were awarded, would be assessed $7,334.42. That is not de minimus. That is not minimal.

For the decision in this case, this Court need not be any more precise than this. This Court often leaves the precise level or measurement for determining a constitutional violation up to future litigation. This issue is certainly no different.

CONCLUSION

The right to be tried, even in a civil case, by a forum where the Judge or triers of fact do not have an interest in the outcome is a fundamental right guaranteed by the due process clause of the 5th Amendment and is applied to the states under the 14th Amendment. As to Judges, the law is well-settled. There is no reason why the same reasoning should not be applied to jurors who also make decisions regarding the facts.

In this case, jurors were faced with the possibility, as taxpayers of Wheatland County, of paying between $63.83 and $7,334.42 if Wheatland County was required to pay the amount requested by Eklund. The average juror would have to pay $1,241.63 as his or her share of the jury verdict. This raises more than a mere possible temptation. It clearly suggests a presumption of bias that must be applied to meet the constitutional requirements of a fair trial.

Nowhere does Wheatland County address these serious constitutional issues. Nowhere does Wheatland County challenge the numbers that each

juror would have to pay as his share of the verdict if Wheatland County were indeed required to pay the judgment. None of the serious issues raised by the Petition are addressed by Wheatland County.

Instead, they suggest deference should be given to the Trial Judge in her rulings regarding the *voir dire*, deference should be given to the Legislature in providing that being a taxpayer of the Defendant is not grounds for dismissal of the juror for cause, and deference should be given to the Montana Supreme Court because it carefully reviewed the decision on the merits.

These arguments simply don't cut it; nor do the arguments that Montana has a good Constitution and in other areas it does a good job of protecting individual rights. Every single argument made by Wheatland County is weak at its best and totally irrelevant at its worst. They have simply failed to grapple with the real issues raised by the Petition.

WHEREFORE, it is respectfully submitted Eklund's Petition for Writ of Certiorari should be granted.

DATED this ____ th day of January, 2010.

Thomas E. Towe
Towe, Ball, Enright, Mackey
Sommerfeld, PLLP
2525 Sixth Avenue North
PO Box 30457
Billings, MT 59107-0457
406-248-7337
Counsel of Record for
Petitioner